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No. 27

In the Supreme Court of the United States

OCTOBER TERM, 1944

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HELMERICH & PAYNE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The Findings of Fact and Conclusions of Law entered by the District Court appear at R. 73–85. The District Court did not deliver an opinion. The opinion of the Circuit Court of Appeals (R. 115–119) is reported at 138 F. (2d) 705.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 15, 1943. A petition

for a writ of certiorari was filed on February 14, 1944. It was granted as to the first question presented on March 27, 1944, and the cause was transferred to the Summary Docket, 321 U. S. 759. The Court requested counsel to discuss the question whether the case is moot. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Has the case become moot because about two months after the Administrator of the Wage and Hour Division instituted this statutory action for an injunction, respondent voluntarily ceased to pay its employees in accordance with the plan which is assailed as in violation of the statute, when respondent continued to defend it as legal throughout the trial and upon appeal?

2. Prior to the enactment of the Fair Labor Standards Act respondent paid certain employees a regular wage for each 8-hour shift, called a tour, regardless of the number of hours worked in the week. In order to avoid paying additional compensation for overtime under the Act, respondent caused these employees to execute agreements reciting that it would pay them a stated "regular rate" per hour for the first 4 hours of each 8-hour tour and one and one-half times that rate for the next four hours. The rate was fixed by a mathematical formula so that the total sum paid for

the 8-hour tour remained the same as it had been prior to the Act. Similar arrangements were made for tours of greater length. Respondent's employees were paid the same tour rate for tours worked beyond 40 hours in the week as for those worked before. The question presented therefore is whether an employee who received the same tour rate for tours worked in excess of the statutory maximum as for the first tours in the week was paid at a rate "not less than one and one-half times the regular rate at which he is employed", as required by Section 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. Sec. 201 *et seq.*) are as follows:

> SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section.
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment

in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, * * *

(2) to violate any of the provisions of section 6 or section 7, * * *

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

STATEMENT

This case arose on a complaint filed in the District Court on May 3, 1941, by petitioner, the Administrator of the Wage and Hour Division, United States Department of Labor, under Sec-

tion 17 of the Fair Labor Standards Act to restrain violations of the Act (R. 4–9). The facts were largely stipulated (R. 13–72). Respondent is engaged in the production of oil and gas for interstate commerce and in drilling wells for such production by others (R. 73), and its approximately 400 employees admittedly are covered by the Act (R. 82, 89). Since October 24, 1938, the effective date of the Act, respondent has used various forms of employment agreements, several of which were the subject of this litigation. From the inception of the Act until July 15, 1941, respondent hired its drilling employees under the so-called "Poxon" or split-day contracts which are the subject of this appeal.[1] There is no dis-

[1] The Poxon plan and the second plan below appear in the contract set forth in Appendix A, *infra*, p. 50. Aside from the Poxon plan, which is before the Court, respondent inaugurated after the passage of the Act other methods designed to preserve its existing daily wage scales without extra payment for hours beyond the statutory workweek. (1) From the effective date of the Act to September 1940, respondent paid some of its men a fixed monthly salary, without regard to the hours worked; this method was held illegal by the trial court (R. 20, 21, 43–47, 23–24, 59–63, 75, 83). (2) Other employees were paid by the split-day plan combined with a provision for payment of the same monthly salary as that paid before the Act, a so-called "advance" making up any difference between the monthly payment and the sum earned on the split-day plan. Pay was never computed on the specified hourly rates, the monthly amount was regularly paid, and "advances" to the workers were never repaid (R. 21–22, 24, 31–32, 49, 65–67, 77). This arrangement was upheld by the lower courts and this Court has denied certiorari with respect

pute about the terms, the method of arriving at them, or the purpose of the contracts. Only their legality is in controversy. The Administrator contends that the contractual method of payment for work in excess of the statutory maximum workweek [2] does not satisfy the requirements of Section 7 (a) of the Act; respondent contends that it does (R. 10).

Prior to the effective date of the Act certain classifications of respondent's employees had worked eight-hour shifts, called "tours," and were paid a wage for each tour—$7.00 to helpers, for example. As a result of the Act they were caused to work under new contracts of employment incorporating the "Poxon" or split-day plan.[3]

The contracts divided each tour into two parts, the first four hours to be paid for at a specified hourly rate called the "base or regular rate," and the last four hours to be paid for at one and one-half times the "base or regular rate" [4] (R. 74, 75–

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to the question presented by that determination. On July 16, 1941, while this litigation was pending, respondent substituted three new methods of wage payments. See *infra*, p. 10.

[2] During the first year after the effective date of the Act the maximum was 44 hours; during the second year 42 hours; and thereafter 40 hours.

[3] This method of payment and similar ones are frequently used, having been publicized through trade channels, and have come to be known by various names, sometimes, as in the case of the "Poxon" plan, by the names of the men who devised them.

[4] In the case of other employees, the tour was 10 or 12 hours and the contract split the day into two five-hour periods and into five- and seven-hour periods (R. 76).

77). The contracts recited that the "base rate" set forth "shall never apply to more than 40 hours in any work week" (R. 74, 77). Admittedly, the so-called "regular" and the "overtime" hourly rates had been calculated to insure that the total wage for the tour would continue the same as before (R. 74, 112). The normal work day or tour was split and a sufficient number of daily hours were compensated at one and one-half times the base rate [5] to insure against the need of paying any sums in addition to the tour wage, even when the statutory maximum workweek was greatly exceeded.[6]

Under the contracts the number of hours in a tour never varied. Because the "regular rate" was derived from a computation backward from the daily wage (R. 112), the latter determined the former, and the employees continued to receive the same daily wage as before, regardless of whether

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[5] By splitting the 8-hour tour into 4 hours of "regular" time and 4 hours of "overtime", 40 hours at straight time would not be exceeded unless more than 80 hours were worked in a week. So, too, with the 10-hour tour split 5 and 5. The 12-hour tour wage, divided into 5 hours at "regular" pay and 7 hours at a time and one-half "overtime rate", would require additional payments only if the workweek were longer than 96 hours.

[6] A letter in the record (R. 112) from the respondent's attorney states: "This schedule was worked out about two weeks before the law went into effect. It was passed upon and approved by the executive board of the company * * * Notice was sent to all of the foremen in the field with instructions to notify the men of the change in wage scale."

they worked eight or sixty-four hours per week. For example, the "regular rate" assigned to helpers, who had formerly been paid $7.00 per tour, was fixed at $0.70 and the "overtime" rate at $1.05 so as to yield them the same $7.00 for an 8-hour tour.[7]

The purpose of these contracts was to avoid the payment of higher rates for the hours worked in excess of the statutory maximum without changing the wages paid for regular working hours. (Findings of Fact No. IV, R. 74; R. 75–77, 109–110; 111, 112.) Under the Act the statutory maximum workweek was reduced from 44 to 42 hours in 1939 and from 42 hours to 40 hours in 1940. Under its contracts, however, it was unnecessary for respondent to disturb the point at which its time and one-half rate was to start or make any other accommodation to the statutory changes. A helper paid $7.00 a tour throughout the week received $42.00 for a six-tour 48-hour week, $49.00 for a seven-tour 56-hour week, and so on, exactly the same pay as he received before the Act was passed. The pay was exactly the same for hours in excess of forty-four, forty-two, or forty as for the first forty-four, forty-two, or forty hours. An example of this arrangement is set out in Appendix A.

[7] The contract did not call the last four hours of the tour "overtime" but the time sheets used by respondent after 1940 did. See, for example, the time sheet at R. 33 which breaks down the hours and rates of pay into regular time ("R. T.") and overtime ("O. T.").

The evidence shows that the contract hourly rates were never used for any practical purpose. The controlling rate for all purposes was the tour rate. When employees worked a sixth tour, making a total of 48 hours, they were paid the tour wage as on other days; thus, the contract "overtime" rate was not applicable to all the hours after forty. When employees worked two tours in a day (16 hours) (R. 29, 35), they would be paid the tour wage twice and not the contract "regular rate" for four hours and "overtime" for all hours in excess of four.[5] Indeed, for two years after the effective date of the Act the company did not keep records of the hours worked at the hourly rates. Until October 1940 the time sheets

[5] In fact, there is no evidence that any employee ever received any amount but the tour rate regardless of whether he worked the full eight-hour tour or only a part of it; on the contrary, the record supports the inference that employees were always paid for a full tour regardless of the number of hours actually worked. Before the Act respondent credited employees with 8 hours for each tour whether they actually worked 8 hours or not (R. 111). Under its Poxon contracts respondent did not for two years record daily hours worked, but only days (R. 27–29), which it stipulated (R. 16, 18) were to be "deemed to mean a 'tour of duty' consisting of 8 hours work." And for the period when hours worked were shown on the time sheets the record fails to disclose a single instance in which any number of hours other than the exact number of hours in a tour was listed as having been worked. The District Court found that the employees continued to receive the same wages for a like amount of work as before the Act (R. 75). See also the testimony of the employee Beatty at R. 100.

merely listed the number of days worked and the daily rate (R. 27, 29). After that time the time sheets listed the number of hours of "regular time" and "overtime" (R. 33); but, as shown above (n. 8), the hours recorded appear to have been the assumed full tours rather than the actual hours worked. In calculating the wage earned for each pay period it was therefore unnecessary to calculate the hours worked at the base rate and those at the overtime rate, but merely to multiply the number of tours worked by the tour rate. The controlling rate for every practical purpose was the tour wage.

The District Court (R. 83) and the Circuit Court of Appeals (R. 117) held that under the decision in *Walling* v. *Belo Corp.*, 316 U. S. 624, the foregoing system of payment did not violate Section 7.

Over two months after the Administrator began this action to compel respondent to cease its violations, respondent discontinued the use of the split-day contracts and substituted several other types of contracts. One of these concededly complies with the Act.* Another was sustained by the lower courts against the contention by petitioner

*Some classes of employees were paid an hourly rate plus time and one-half for hours worked over 40 (R. 19, 37). There was no specified total payment and no "advance". This method complies with Section 7.

that it was illegal.[10] A third was found bad by the Circuit Court of Appeals.[11] In granting certiorari upon the question of the legality of the Poxon plan, this Court has asked for a discussion of the question whether the case is moot.

SPECIFICATION OF ERRORS

The court below erred:

1. In holding that the "base or regular" rates specified in the contracts between the respondent and its employees were the "regular rates" at which the employees were employed within the meaning of Section 7 of the Fair Labor Standards Act.

2. In holding that the payment of one and one-half times the specified "base or regular" rates, which respondent's contracts provided as payment

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[10] This plan is a variation of the second arrangement described in n. 1, p. 5 *supra*. For some employees, the split-day feature was replaced by payment for the first 40 hours in each calendar week at a "regular" hourly rate, with time and one-half for additional hours; a stipulated periodical payment was made bi-weekly instead of monthly, and the "advance" feature was retained (R. 24–25, 37, 69–71, 79, 103). Both the trial court and Circuit Court of Appeals sustained this method of payment and this Court denied certiorari.

[11] For other employees, an entirely new scheme was devised, the X plan, under which the hourly pay was called X and was found each week by the formula X = weekly wage ÷ (40 + 1½ times the number of hours worked beyond 40). The employees were paid a fixed sum every two weeks, regardless of hours worked (R. 22, 53). The trial court held the X plan valid (R. 83), but the Circuit Court of Appeals reversed (R. 119).

for the latter hours of the daily tours, satisfied the requirement of Section 7 that respondent pay its employees for work in excess of the statutory maximum workweek at a rate not less than one and one-half times the regular rates at which they were employed.

3. In failing to hold that the regular hourly rates were the tour wages divided by the number of hours in a tour.

4. In failing to find that, as respects workweeks longer than the maxima prescribed in the Act, the respondent had violated Sections 7 and 15 (a) (2) of the Act.

5. In failing to hold that the respondent had violated Section 15 (a) (1) of the Act by selling, shipping, delivering, transporting, and offering for transportation in interstate commerce goods in the production of which employees compensated under the contracts in question were employed in violation of Section 7 of the Act.

6. In failing to reverse the judgment of the District Court in so far as it denied petitioner's prayer for an injunction with respect to the contracts in question and the shipment of goods in the production of which employees had been compensated under those contracts.

SUMMARY OF ARGUMENT

I

Respondent's discontinuance of the challenged method of compensation after petitioner's suit to enjoin its use was instituted did not render the case moot. The controversy between the parties still exists. Respondent throughout the trial and upon appeal has steadily urged that its contracts were legal, and the judgment below leaves it free to resume the challenged conduct. Respondent's consistent purpose of avoiding the financial burden of Section 7 and use of numerous plans to that end make resumption of the device in issue not improbable.

From *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897) to *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332 (1944), this Court has repeatedly held that suits for injunction brought by Government enforcement agencies do not become moot merely because the defendant is not engaging in the action complained of at the time the judgment issues. Voluntary discontinuance by the respondent of the unlawful conduct does not render it impossible for the court to grant petitioner effective relief. An injunction will have force and operative effect with respect to respondent's right to resume the activity and the Administrator's power to prevent its doing so. The petitioner's

duty to enforce the Fair Labor Standards Act as a "substantial trustee for the public" requires that he secure the judgment of the Court on the legality of the plan in issue as it may in the future be used by respondent and others.

II

A. Respondent's split-day employment contracts do not meet the requirements of Section 7. The legislative purpose of the Section was to make employment beyond the statutory maximum workweek more costly to the employer and more remunerative to the employee than work during this period and thus to deter by its burden employment beyond the statutory period. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577–578. Under respondent's plan, tours worked beyond the statutory maximum were paid for at precisely the same rates as those worked before the maximum was reached. The plan simply provided a fixed daily wage for a fixed day's work, continuing the arrangement in operation before the Fair Labor Standards Act. Under its contracts respondent could work its employees 80 hours a week, and in some instances more, without paying anything in addition to the regular tour wages. The judgment below permits the parties to substitute an 80-hour maximum workweek for the 40-hour maximum prescribed by the Act.

B. The "base or regular" rates specified in the

contracts were not the "regular rates" at which the respondent's employees were employed and upon which "time and one-half" must be paid for overtime work. If the penalty rate of 150 percent prescribed by Section 7 is to have the effect intended, it must be based upon the rate which is actually paid for nonovertime hours. In this case the "regular rate" is the tour rate, which the employee received day in and day out. The "regular" hourly rate was the tour wage divided by the number of hours in the tour. Respondent failed to pay its employees time and one-half this rate.

Under respondent's contracts, the specified "base or regular rate" was allocated not to all the normal working hours but to a fraction of the customary workday. So, too, the rate of one and one-half times the stipulated "regular" rate was not extra compensation for real overtime hours, either daily or weekly, but payment for a designated part of the normal workday or tour. When the employee really worked overtime, he did not get the higher rate for the excess hours. For example, when he worked 16 hours a day (2 tours), he received the tour rate twice and not time and one-half for all hours over 4 or for the 8 hours which were added to the normal workday.

C. The decision of this Court in *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, upon which the lower courts relied, does not sustain the validity of re-

spondent's contracts. In the *Belo* case this Court held that under the facts there involved the "basic rates" contracted for did actually control the employees' compensation, and the employees were paid "not less than time and one-half" that rate for hours over forty. In the instant case the designated "regular" rates had no demonstrable effect in determining the employees' weekly compensation except in the situation—which never in fact occurred—that the employees worked more than 80 or 96 hours.

The *Belo* decision does not announce the principle applied by the court below that the parties may by contract fix any rate they choose as the "regular rate" to which the overtime multiple is to be applied, regardless of its relationship to the employer's wage cost. Although rates of pay result from consensual arrangements between employer and employee and the regular rate is derived from the weekly wage cost which these rates produce, the contracting parties may not by their mere assertion determine what the regular rate shall be for the purpose of meeting the requirement of Section 7. To hold that they may would defeat entirely the legislative purpose. Section 7 was intended to limit the rights of the parties to contract with respect to compensation for hours in excess of the statutory maximum workweek. Section 7 (b) indicates the restricted field in which Congress intended that the requirements of Section 7 (a) could be relaxed by agreement.

ARGUMENT

I

UNDER THE DECISIONS OF THIS COURT DISCONTINUANCE OF AN UNLAWFUL COURSE OF CONDUCT DOES NOT RENDER THE GOVERNMENT'S SUIT FOR AN INJUNCTION MOOT WHEN SUCH CONDUCT MAY BE RESUMED AT RESPONDENT'S OWN VOLITION

As the statement of facts shows, the respondent since the passage of the Fair Labor Standards Act has utilized a variety of wage plans, all designed to maintain without change preëxisting wages for workweeks in excess of the statutory maximum (R. 74, 108–112). For a period of two years from the date of the Act, certain classes of employees were paid a flat monthly salary irrespective of the number of hours worked, in plain violation of the overtime requirements of the Act (Findings of Fact VIII, R. 75; Conclusions of Law III, R. 83). See *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. The continued use of this arrangement was enjoined by the District Court (R. 83, 84).[12] For about three years after the effective date of the Act and until two months after the institution of this suit,[12] the respondent paid many of its employees in accordance with the so-called Poxon or split-day plan which is in issue here. The discontinuance of the Poxon plan did

[12] Some of the new contracts were in fact not signed until September 1941 but they were made retroactive to July 16, 1941 (R. 103, 104). The complaint was filed May 3, 1941.

not result in full compliance with the provisions of Section 7 as interpreted by the court below. Lease pumpers were paid, at least up to the time of trial, under the so-called "X Plan" which the Administrator contended and the Circuit Court of Appeals found to be in violation of the Act (R. 117–119).

Respondent has not disclaimed an intention to revert to the use of the Poxon plan.[13] It has sought in both lower courts a determination of the validity of that method of payment even after its use was discontinued.[14] In its pleadings and at the trial, respondent maintained that all its methods of compensation used since 1938 were legal in-

[13] There is no evidence in the record as to whether respondent has utilized the plan since it was upheld by the lower courts.

[14] The District Judge at a pre-trial hearing requested briefs on the question whether an injunction should issue if respondent was found to have been in compliance since July 16, 1941. The attorneys for respondent advised the Court that "after a careful study of plaintiff's brief * * * and * * * an independent check of the authorities" they had "come to the conclusion that in an action by the Government to enjoin violations of penal statute such as that in question, that the cessation of said alleged violation after suit is filed does not render the question moot to the extent that a court of equity should not grant the injunction if prior violations are proved. Especially in the absence of proof of good faith and other extenuating circumstances relating to the violations such as uncertain interpretations of new laws, acting on advice of counsel, etc." (Letter from Settle, Monnet & Clammer to Honorable Judge Royce H. Savage dated March 10, 1942.)

No contention that the case had become moot was made by respondent in the Circuit Court of Appeals.

cluding the Poxon plan here in issue. It took the same position before the Circuit Court of Appeals. Both lower courts ruled upon the validity of the plan.

The mere discontinuance of the acts assailed as unlawful after action is brought to have them enjoined does not render the case moot. Cases and controversies which the federal courts are empowered to decide do not evaporate when the defendant merely ceases the conduct in issue. When this suit was brought, the parties were in disagreement as to the validity of the challenged plan of compensation.[15] At that time there was certainly a case or controversy over which the court had jurisdiction. The same dispute between the parties continues. Although respondent later discontinued the use of the contracts in question, it has steadily maintained through the trial and upon appeal that they complied with the requirements of the Act. No promise has been made not to resume them. Even if there had been such a promise, the case would not be moot, since voluntary discontinuance of unlawful practices, although accompanied by such a promise, does not remove a case from the judicial power. *Sears, Roebuck & Co.* v. *Federal Trade Comm.*, 258 Fed. 307, 310 (C. C. A. 7).

[15] The Administrator publicly announced his view that the split-day plan was unlawful in July of 1940. In a revision of his Interpretative Bulletin No. 4 a plan similar to that of respondent was described (par. 70 (4)) and the position was taken that it did not comply with Section 7.

A case becomes moot under the principles announced by this Court, when "without any fault of the defendant" [16] a supervening "event * * * renders it impossible for this court * * * to grant [plaintiff] any effectual relief whatever * * *", *Mills* v. *Green*, 159 U. S. 651, 653; *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm.*, 219 U. S. 498, 515, or when "there is no subject-matter on which the judgment of the court can operate," *Ex parte Baez*, 177 U. S. 378, 390; *Brownlow* v. *Schwartz*, 261 U. S. 216, 217; *St. Pierre* v. *United States*, 319 U. S. 41, 42. If cessation of the challenged conduct is caused by forces beyond the control of the parties, the case may become moot. *United States* v. *Hamburg-American Co.*, 239 U. S. 466; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *United States* v. *Alaska S. S. Co.*, 253 U. S. 113.

Where, however, a defendant has voluntarily ceased the activity sought to be restrained before judgment issues, an injunction or other preventive order still has force as applied to his future conduct. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 334; *cf. St. Pierre* v. *United States*, 319 U. S. 41, 43. The judgment prevents

[16] Voluntary dissolution of a corporate defendant against which the District Court had granted an injunction, pending an appeal by the Administrator from a Circuit Court of Appeals' judgment of reversal, was held by this Court not to render the case moot. *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671.

him from resuming the activity in question. A long line of cases has therefore proceeded to adjudication in this court notwithstanding the abandonment of the practices sought to be enjoined. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *Federal Trade Comm.* v. *Goodyear Tire and Rubber Co.*, 304 U. S. 257; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *J. I. Case Co.* v. *National Labor Relations Board, supra.* This principle applies to injunction suits against the Government as well as to those brought on its behalf. *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm.*, 219 U. S. 497, 516. See also *McGrain* v. *Daugherty*, 273 U. S. 135, 180–182. Accordingly, discontinuance by a violator of an illegal course of conduct has not precluded restraint of possible future violations at the instance of the Government [17] or one of its enforcing agencies such as the Federal Trade Commission,[18] the Securities and Exchange Commission,[19] the Office of Price Administration,[20] or the National Labor

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[17] *United States* v. *Trans-Missouri Freight Assn.*, *supra.*

[18] *Federal Trade Comm.* v. *Goodyear Tire and Rubber Co.*, 304 U. S. 257, 260; *Sears, Roebuck & Co.* v. *Federal Trade Comm.*, 258 Fed. 307, 310 (C. C. A. 7); *Guaranteed Veterinary Co.* v. *Federal Trade Comm.*, 285 Fed. 853, 859, 860 (C. C. A. 2).

[19] *Otis & Co.* v. *Securities and Exchange Comm.*, 106 F. (2d) 579 (C. C. A. 6); *Securities and Exchange Comm.* v. *Torr*, 22 F. Supp. 602 (S. D. N. Y.).

[20] *Hecht Co.* v. *Bowles*, 321 U. S. 321.

Relations Board.[21] It would be difficult to justify the application of different principles in the enforcement of the Fair Labor Standards Act.

In the enforcement through nation-wide litigation of a statute such as the Fair Labor Standards Act the Administrator acts "as a substantial trustee for the public." *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. at p. 309. See also *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671, 674–675. He was given no power to determine by regulations or orders whether particular methods of payment comply with the provisions of the Act. "* * * the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations." *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 523. It is therefore only through adjudication of particular controversies in suits brought to enjoin alleged violations that general principles as to the scope and meaning of the statute can be educed. Paraphrasing the language of this Court in *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308–310, it may therefore be said that the most important object of this litigation is not to get respondent to discontinue the use of the split-day plan, but

[21] *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 334; *National Labor Relations Board* v. *Pittsburgh Greyhound Lines*, 309 U. S. 261, 271; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230.

to determine the legality of the plan as it may in the future be used by this respondent and others.[22] *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331, 334–335 (C. C. A. 8); *Walling* v. *Haile Gold Mines*, 136 F. (2d) 102, 105 (C. C. A. 4).

The realities of the enforcement problems of the Administrator make it no adequate answer to point to his ability to institute a new action if respondent should resume the practice which was abandoned "in prophecy of or dread of suit" (*United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 445). His enforcement task is vastly different from the prosecution of purely personal rights by a private litigant in a suit for equitable relief. See *United States* v. *San Francisco*, 310 U. S. 16, 30–31. Sound administration compels careful review by the Administrator and his staff of the issues involved in every instance of proposed litigation, together with careful investigation and confirmation of the operative facts. Whereas the private litigant usually becomes immediately aware

[22] The decision of the lower courts unreversed would encourage other employers to inaugurate or continue the use of the plan. *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331, 335 (C. C. A. 8). The Poxon plan has been circulated among metal mining operators and Wage and Hour Division officials have reported its extensive use in the mining industry in the Western states and in Alaska. Experience with enforcement of the Fair Labor Standards Act has shown an increase in the use of plans to avoid the cost of Section 7 upon their validation by the Circuit Courts of Appeals when review by this Court is not sought or is denied.

of a renewal of the injury by his adversary, a Government agency is able to ascertain a resumption by a violator of his injury to the public only after the duplicated effort and expense of another inspection. Moreover, if discontinuance renders the action moot, the bringing of a new suit when the practice is resumed will not insure the determination of the issue. If respondent once more shifts to a different method of payment,[23] the Administrator's new inspection and suit will again be futile. See *Otis & Co.* v. *Securities and Exchange Comm.*, 106 F. (2d) 579, 583 (C. C. A. 6). Thus, even the maintenance by the Administrator of an uninterrupted vigil over this employer—a practice wholly undesirable, even if not administratively impossible—might not enable him to obtain an adjudication of the issues presented by respondent's violations.

Resumption of the challenged practices by respondent is not improbable. The contracts have been declared valid by the courts below. Respondent has always maintained that they were legal. Its consistent aim has been to avoid the payment of additional compensation for statutory overtime, while retaining the same work schedules. Respondent persisted in computing the wages to some of its employees under the illegal "X contract" down to the date of trial, and presumably

[23] The employment contracts used by respondent after discontinuance of the Poxon plan are terminable at will by the employer. See e. g. R. 38.

until the adverse ruling of the Circuit Court of Appeals (R. 22, 80). The abandonment of the contracts in question is "no assurance * * * that petitioner [respondent] if it could shake respondent's [petitioner's] hand from its shoulder, would not continue its former course". *Sears, Roebuck & Co.* v. *Federal Trade Comm.*, 258 Fed. 307, 310 (C. C. A. 7); *Guarantee Veterinary Co.* v. *Federal Trade Comm.*, 285 Fed. 853, 860 (C. C. A. 2); see also *Juvenile Shoe Co.* v. *Federal Trade Comm.*, 289 Fed. 57, 59–60 (C. C. A. 9). As in *Fleming* v. *Jacksonville Paper Co.*, 128 F. (2d) 395, 399 (C. C. A. 5), affirmed, 317 U. S. 564,[24] "This case is not one where the violations were dead issues at the filing of the suit; nor was cessation entirely voluntary, but was the result of recent official pressure." The prties are still in serious disagreement over the point of law; "it is clear there had been recent violations, and there was still contention, and this is enough to ground the grant of injunction upon." *Ibid.*

[24] The decisions of other Circuit Courts of Appeals in suits brought by the petitioner have been conflicting. In *Fleming* v. *Cincinnati Union Terminal Co.*, 117 F. (2d) 1012 (C. C. A. 6), the defendant altered its plan of compensation subsequent to the filing of the complaint and claimed that the new plan constituted compliance which rendered the controversy moot. The validity of the new plan was not challenged. The Circuit Court of Appeals for the Sixth Circuit reversed the District Court's judgment of dismissal, holding that the case presented "justiciable issues which [the Administrator] has a right to have determined." The Circuit Court of Appeals for the Fourth Circuit has granted an injunction although the

See also *Otis & Co.* v. *Securities and Exchange Comm.*, 106 F. (2d) 579, 584 (C. C. A. 6).

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defendant discontinued its business pending appeal. *Walling* v. *Haile Gold Mines*, 136 F. (2d) 102. In *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331 (C. C. A. 8), an injunction issued although defendants pending appeal had been "liquidated in bankruptcy" and had apparently ceased to do business. In both the *Haile* and *Mutual* cases the courts rejected the contention that the cases had become moot. In *Walling* v. *Shenandoah-Dives Mining Co.*, 134 F. (2d) 395 (C. C. A. 10), the defendant pleaded by supplemental answer that it had entered into a collective bargaining agreement prescribing a new method of wage payments which complied with the Act. The court found that at a pretrial conference "counsel for the administrator * * * stated that they did not dispute * * * the statement of counsel for the company that it intended in good faith to comply with the Act" (p. 396). Dismissal of the complaint was affirmed apparently both because the case was thought to have become moot and because the denial of an injunction by the District Court was not an abuse of discretion. Murrah, C. J., dissenting, was of the view that the later compliance did not remove the controversy between the parties as to the legality of the plan and that the Administrator was still entitled to have that controversy adjudicated. In *Walling* v. *T. Buttner & Co.*, 133 F. (2d) 306 (C. C. A. 7), certiorari denied, 319 U. S. 771, the trial court granted an injunction although the defendant had discontinued the challenged conduct before the complaint was filed. The Circuit Court of Appeals reversed. It did not find the controversy moot; but because it concluded that there was no probability of violations being resumed, it held that an injunction "was not authorized" (p. 308).

In *Walling* v. *Florida Hardware Co.*, 142 F. (2d) 444 (C. C. A. 5), the district court's denial of an injunction was upheld since the "inadvertent" violations of the defendant were discontinued before the judgment was entered. The Circuit Court of Appeals pointed out that the Administrator had the benefit of the findings and conclusions of the trial court and received a judgment for costs.

Of course, the issue here is not the propriety of injunctive relief. Even in a case in which an injunction is not warranted because the violations have ceased and resumption is not likely, other relief may be afforded and the cause is therefore not moot. The case may be retained on the calendar, or a decree framed so that the court can deal summarily with future violations on the basis of the trial already had. See *Walling* v. *John J. Casale, Inc.*, 51 F. Supp. 520, 526–527 (S. D. N. Y. 1943); *Hecht Co.* v. *Bowles*, 321 U. S. 321; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 378. Cases holding that where violations have ceased with little probability of recurrence no injunction will be granted, of which *United States* v. *United States Steel Corp.*, 251 U. S. 417, is typical, mean only that injunction is not the proper relief, not that the case is moot. If this Court should decide that the agreements are invalid, the judgment below would presumably be reversed and the cause remanded so that the District Court can determine whether an injunction should issue or some other form of relief be granted.

The legality of respondent's conduct in using the contracts and its right to use them again are still in issue and require the judgment of this Court. Its decision on the merits will affect respondent's right to resume that conduct and petitioner's power to prevent it. Thus effective re-

lief can be granted. Both parties sought to have the courts below decide whether respondent's conduct was in violation of the statute. See *Federal Trade Comm.* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 259. For these reasons, it is respectfully submitted that the case is not moot.

II

RESPONDENT'S WAGE CONTRACTS DO NOT SATISFY THE REQUIREMENT OF SECTION 7 THAT WORK BEYOND FORTY HOURS IN THE WEEK BE PAID FOR AT ONE AND ONE-HALF TIMES THE REGULAR RATE

A. *The plan provides a fixed daily wage which affords no additional compensation for hours over 40 a week—it substitutes an 80-hour maximum workweek for the statutory maximum.*—In the *Missel* case (*Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572) this Court rejected the contention that a weekly salary "which amounted to the required minimum for regular hours and time and a half the minimum for overtime" satisfied the requirements of Section 7 of the Act. The Court has also rejected a similar contention made with respect to a daily wage large enough to compensate the employees "in excess of the statutory minimum wage, including time and one-half of that minimum wage for all overtime hours." *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 93. The *Missel* case held that the "intended effect" of Section 7 (a) to require "extra pay for overtime

work by those covered by the Act even though their hourly wages exceeded the statutory minimum" is "clear and unambiguous" (p. 577). The test to determine whether a plan of compensation complies with the overtime provisions of the Act is to ascertain whether it provides the specified increased pay for overtime work. The overtime with which the Fair Labor Standards Act is concerned is work beyond the prescribed statutory workweek of 40 hours. The "unit of time * * * within which to distinguish regular from overtime is the week." *Missel* case at p. 579. The additional 50 percent pay required by the Act is for hours worked beyond the prescribed number in the week.

Respondent's wage scale was simply a fixed wage for a fixed day's work and did not meet these requirements.[25] No greater payments were made

[25] The Administrator, in reissuing his Interpretative Bulletin No. 4 in July 1940, added a consideration of special problems presented by Section 7 of the Act and in Par. 70 (4) expressed the conclusion that a described plan similar to that of the respondent did not comply with the Act. Par. 70 (4) as subsequently revised for the 40-hour week reads:

"Suppose an employee was paid $4.04 a day prior to the effective date of the act for a normal workday of 8 hours. His workweek consisted normally of 6 workdays. Thus he earned $24.24 a week for a workweek of 48 hours. The parties agree that henceforth the employee's rate of pay will be 46.5 cents an hour for the first $6\frac{2}{3}$ hours of the day and 70 cents (one and one-half times 46.5 cents) for the remaining $1\frac{1}{2}$ hours. The employee will continue to

for work during weekly overtime hours than for work during non-overtime hours. The workweek was reduced to a factor of no significance.[26] Instead the latter portion of each tour was treated as overtime payable at the designated overtime rates, with the purpose that when more than 40

receive $4.04 a day or $24.24 for a 48-hour workweek. * * *. The division of a normal 8-hour workday into 6⅔ straight-time hours and 1⅓ overtime hours is purely fictitious. The employee is not paid at the rate of 46.5 cents an hour and the alleged overtime rate of 70 cents is not paid for overtime work. * * * The employee will continue to receive $4.04 a day for a normal 8-hour day. His regular rate of pay is not 46.5 cents—which is a fictitious bookkeeping rate adopted solely as the basis upon which to compute overtime in order to evade the requirements of section 7 of the act—but 50.5 cents an hour [$24.24 ÷ 48 = 50.5 cents]. See pars. 16 through 27 of this bulletin. For a workweek of 48 hours the employee should receive $26.28 ([40 × 50.5¢] + [8 × 76¢])."

The Administrator's interpretations of Section 7, while they do not purport to be binding, have been held by this Court to "carry persuasiveness." *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572, 580–581, n. 17. See also *United States v. American Trucking Assns., Inc.*, 310 U. S. 534, 549.

[26] The change in the statutory maximum workweek from 44 to 42 hours in 1939 and to 40 hours in 1940 required no change in the respondent's scheme. The tours continued to be "split" at the same points and the same tour rates applied. In 1938 when the statutory maximum was 44 hours respondent could, under these contracts, work its employees 88 hours in the case of 8- and 10-hour tours and 105.6 hours in the case of 12-hour tours, without additional compensation beyond the regular daily rate. In fact, however, 64 hours seems to have been the longest and 56 hours the usual workweek which respondent's employees worked (R. 29).

hours had been worked, enough "overtime" would already have been accumulated during the earlier portion of the week to render additional payments for weekly overtime hours unnecessary. The provision in the contract that the base rate should not apply to more than 40 hours had only theoretical significance. It meant only that in the unlikely situation—which never in fact occurred—that employees worked more than 80 hours per week (in the case of those working an 8-hour tour) or 96 hours (for those working a 12-hour tour) additional compensation would theoretically become due because the "base rate" would otherwise apply to more than 40 hours.

Under respondent's contracts, work beyond the statutory week was paid for at exactly the same rate as work during it. The same rate was applied to every tour though 6 or 7 were worked in the week and the 40-hour maximum was exceeded. A mechanic received $7.00 for the first 8-hour tour in the week and $7.00 for a 7th tour, although he was then working a 56-hour week. For the 57th hour (the first hour of an eighth tour) the pay under the contract was the same as for the first hour of the week. For the 61st hour (the fifth hour of the eighth tour) the employee got the same amount as for the 5th hour of the week. Designating the last four hours in each tour as overtime hours to be paid for at time and one-half the rate specified for the first four hours did not

provide a higher rate for the hours worked beyond 40. It is thus apparent that the hours worked in a week did not affect the rate of compensation paid. The controlling consideration for every practical purpose was the tour rate just as it had been before the Act was in existence.

Respondent's arrangement does not provide compliance with the overtime provisions of the Act. Section 7 was designed to spread employment by making it more costly to employ a certain number of workers in excess of 40 hours a week than it would be to employ a larger number for 40 hours.[27] *Missel* case, *supra*, pp. 577–8. "The Fair Labor Standards Act sought a reduction in hours to spread employment * * *." *Southland Co.* v. *Bayley*, 319 U. S. 44, 48. See *Bunting* v. *Oregon*,

[27] That during the post-war reconversion period reliance will once more be placed upon Section 7 to "spread the work" was emphasized by War Mobilization Director James F. Byrnes in a letter to the President dated September 7, 1944. Mr. Byrnes recommended return to a 40-hour workweek in civilian industries after the termination of the European phase of the war. "This will give jobs to those who are left without employment."

Mr. Byrnes also suggested that the 48-hour workweek remain in effect with respect to employees engaged in war production. The increased earnings from the "time and one-half for the extra eight hours" in war industries would serve as a "financial incentive" which might "induce workers to remain in war production instead of returning to civilian employment at lower earnings under a 40-hour straight-time week."

The letter is printed in the N. Y. Times for September 10, 1944, at p. 41, col. 5.

243 U. S. 426, 436. The Act was intended "to require extra pay for overtime work", even where the hourly wage exceeds the minimum (*Wessel* case at p. 577), and therefore required payment of the employees at a premium rate of 150 percent for the "burden of a workweek beyond the hours fixed in the Act" (*id.* p. 578). Respondent substituted for the statutory maximum workweek of 40 hours a maximum workweek of 80 hours, since it was only for hours in excess of 80 that an increased rate of compensation became payable.[28]

B. *The rates stipulated in respondent's contracts for the first hours in the tour were not the "regular rates at which" its employees were employed.*—Although the words "regular rate" are words of colloquial speech, in Section 7 they have a special meaning. The Act, however, has not supplied that meaning in a stated definition, but leaves it to be derived from two sources:[29]

(1) The statutory purpose of Section 7, to spread the work by making overtime work more costly to the employer and to make such work more remunerative to the employee than nonovertime work, and

[28] Moreover, under its contracts respondent would have been required to pay at an increased rate for only one-half the number of hours over 80, since the latter half of each tour already carried the increased rate.

[29] Problems of construction of the Fair Labor Standards Act are not to be "solved simply by a literal reading" of the particular section of the Act but "in the light of the purposes which led to the enactment of the entire legislation." *Southland Co.* v. *Bayley*, 319 U. S. 44, 47.

(2) The use of "regular rate" in Section 7 to designate the base upon which the multiple rate prescribed for overtime work is to be computed.

Considered in this light, "regular rate" can only mean the rate for the ordinary, normal, or non-overtime workweek—40 hours under the Act—in contrast to the rate for extraordinary or unusual hours.[30] The time and one-half rate designated for overtime work has its prescribed meaning only if it is a multiple of the rate which is paid for work for which no premium is required. See *Cabunac* v. *National Terminals Corp.*, 139 F. (2d) 853, 854 (C. C. A. 7); *Walling* v. *Wm. Schollhorn Co.*, 54 F. Supp. 1022 (D. Conn.); *United States* v. *Myers*, 320 U. S. 561, 573. This usage accords with the practice of distinguishing in collective-bargaining agreements between "regular" work and "regular" rates of pay on the one hand and "overtime" work and rates on the other. See *Hours of Work Provided in Collective Agreements in 1937*, 46 Monthly Labor Rev., 341, 345–346 (1938); *Union Agreement Provisions*, Bull. No. 686 (U. S. Dept. of Labor, 1942), 84, 91. The use in Section 7 of a multiple of the "regular rate" as a method of requiring increased compensation for overtime work is a familiar legislative

[30] This usage meets the dictionary definition of the word "overtime" which is defined as "time beyond, or in excess of, a set limit; esp., extra working time." *Webster's New International Dictionary* (unabridged 1943 ed.).

formula.[31] See *Bunting* v. *Oregon*, 243 U. S. 426, 434.

The "regular rate," of course, must be a rate actually paid if the 150 percent is to be in fact increased compensation. It must be the actual labor cost for nonovertime hours if Section 7 is to "deter by its burden" (*Bunting* v. *Oregon*, 243 U. S. 426, 436), to the extent intended, the working of hours beyond the statutory maximum. In the instant case the "regular" rate of employees compensated under the Poxon plan was the tour rate paid for every tour.[32] This was the rate every employee received for working throughout the week. It was the base cost to respondent of the

[31] A number of illustrative state statutes requiring increased compensation for overtime work are collected in Appendix B, *infra* pp. 52–53. Some of these statutes and orders speak of straight time compensation as the "regular" rate. Others refer to the "normal" rate. Still other state statutes illustrate that "time and a half" has a sufficiently familiar meaning to be understood without specification of the base.

[32] Since Section 7 requires the increased compensation to be on an hourly basis, the regular rate must be converted into its hourly equivalent. And since the "unit of time" under Section 7 is the week, the weekly nonovertime compensation divided by the hours worked yields the regular hourly rate (*Missel* case, *supra*, pp. 579–580). Piece rates, day or tour rates, and biweekly and monthly salaries must first be converted to their weekly equivalents to determine the regular hourly rate for the week involved. See pars. 8 and 10, Interpretative Bulletin No. 4, *supra*, note 25, p. 29. In the instant case the tour rate divided by the number of hours in the tour will yield the same rate as the weekly wage divided by the number of hours worked in the week.

labor of its employees. The same rate was paid for tours worked before 40 hours as for those worked thereafter, and the "regular" rate which the employee received for each hour worked was the tour rate divided by the hours in the tour. A helper who was paid $7.00 for each 8-hour tour whether it was the first or seventh in the week was being paid $0.875 per hour. This was his regular rate in the statutory as well as in the everyday sense. It did "not vary for the entire week." *Missel* case, *supra*, p. 580. It was the rate he received for all hours worked, nonovertime and overtime. It was the cost to the respondent for every hour of his employee's work. For hours in excess of 40 the employee should, because of the statute, have received one and one-half times that rate, or $1.263. Since no such employee was paid $1.265 for the hours worked over 40, the requirements of section 7 of the Act plainly were not met.

The base rates specified in respondent's employment contracts were not the "regular rate[s] at which [its employees were] * * * employed" within the meaning of the statute, nor were they the hourly rates paid before the Act. They were unreal and fictitious. They were concededly designed by respondent to permit continuation of its method of paying the same daily wage for each day worked regardless of the number of hours

worked in the workweek.[33] They were allocated by the contract not to the normal working hours but to a fraction of the normal workday. So, too, the time and one-half the stipulated "regular" rate was not extra compensation for real overtime hours, either daily or weekly, but payment for designated hours worked in the *normal* workday or tour (the last 4 in the 8-hour tour, the last 5 in the 10-hour tour, and the last 7 in the 12-hour tour). Since the normal workday had been 8, 10, and 12 hours for the respective classes of employees both before and after the passage of the Act, it is apparent that the hours for which the "overtime" pay was allocated were never in fact overtime hours.

The artifice of the arrangement is made apparent by the failure to relate the overtime rate to situations in which unusually long hours were in fact worked. Thus, when two tours were worked in a day, the employee was paid the tour wage twice and not the contract "regular" rate for 4 hours and time and one-half for the 12 hours in excess of 4.

The Government does not argue that genuine overtime premium rates may not be paid on a daily basis for work beyond the normal workday. Such

[33] The trial court found that "The underlying purpose and the practical effect of these respective wage plans effective prior to July 15, 1941, were to maintain employees' wages as [at] same level as before the Act went into effect" (Finding of Fact No. IV, R. 74).

overtime pay would not raise the regular rate and the employer would be entitled to credit it against the weekly overtime compensation which would be due under Section 7 for work beyond 40 hours. For example, an employee who customarily works an 8-hour day at $1.00 an hour may under his employment contract be paid time and one-half for daily hours beyond 8. If he works 12 hours on the first day of the workweek, the $6.00 which he gets for the 4 hours of overtime on that day do not affect his regular rate of pay which remains $1.00 an hour. Should he work 44 hours in that week, the Act would require the payment of $46.00 (40 hours at $1.00 plus 4 hours at $1.50). He would, however, receive the same amount by reason of the daily overtime, and the Act would require no additional payment.[34]

Respondent's split-day method of payment is outside this principle, however. The specified payment for "overtime" was for work within the regular workday, for the 8-hour tour was the normal day-to-day work schedule both before and after the passage of the Act. As has already been shown, when an abnormally long day em-

[34] "Extra compensation paid for overtime work need not be included in determining the employee's regular hourly rate of pay." Par. 13, Wage and Hour Division Interpretative Bulletin No. 4, originally issued November 1938, reissued, revised, and supplemented December 1939, July 1940, and November 194. See also Pars. 70 (3) and 70 (4), distinguishing between cases of genuine daily overtime and arrangements like the contracts in issue here.

bracing genuine overtime was worked, the employee did not get the time and one-half rate for all hours worked beyond 4; when he worked two tours or 16 hours in one day, he did not receive 150 percent of the "base rate" for 12 hours. He was paid the same rate for each tour, or two days' pay for two days' work, and not the higher rate of pay for the extra work. Respondent cannot contend that the contract in such a case, since it allowed 8 hours of "overtime" pay, allocated this increased compensation to the last 8 of the 16 hours worked, because by the contract the employee was entitled to 4 hours of overtime pay when he completed the first tour.

To permit such devices to succeed is to put the policy of overtime compensation for overtime work at the mercy of "lawyer's ingenuity" (*Griffiths* v. *Commissioner*, 308 U. S. 355, 357), and to ignore this Court's admonition against construing the Fair Labor Standards Act "in a narrow, grudging manner." *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local et al.*, 321 U. S. 590, 597. Section 7 would lose its vitality as an instrument to carry out the legislative purpose of making a long workweek more costly to the employer and more remunerative to the employee. Daily and weekly wages could then be retained unchanged and longer workweeks worked without added compensation. Employers need only devise appropriate mathematical formulas specifying ar-

bitrary "regular" rates such that the normal weekly or daily wage would cover time and one-half for overtime hours beyond the longest work-weeks actually in use. Cf. *Valentine* v. *Christensen*, 316 U. S. 52, 55. It is unnecessary for us to employ the "familiar dialectic" of suggesting extreme cases. The reality of the danger is evidenced by the instant case itself and also by variations of the Poxon plan actually used by certain mining companies.[35] In one such case the first hour of each week or month was designated by the contracts to be paid for at the specified "regular" rate. All the remaining hours worked in the week or month were paid for at the "overtime" rate of time and one-half. *Walling* v. *Arctic Circle Exploration Co.*, 7 Wage Hour Rept. 364 (W. D., Wash., 1944). See also *Walling* v. *Alaska-Pacific Consolidated Mining Co.*, 7 Wage Hour Rept. 367 (W. D., Wash., 1944).

That the parties have contracted to regard the specified rate as the "regular" rate when it is not

[35] Even respondent with respect to watchmen whose normal workday was 12 hours designated only 5 of them as "regular" and 7 as "overtime." The disingenuousness of respondent's employment contracts is shown by the use of the "X Plan" at least through the date of the trial with respect to lease pumpers working irregular workdays and workweeks (R. 95). See note 11, *supra*, p. 11. In such cases the Poxon plan was apparently not feasible and the algebraic equation for ascertainment of the regular rate was used. The plan was upheld by the District Court but this part of the judgment was reversed by the Circuit Court of Appeals (R. 117-119).

so in fact cannot control the operation of Section 7[36] unless it be held that employees may waive their rights under the Act. This of course they may not do. *Missel* case, *supra*, p. 577. *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 602–603; *D & L Production Co.* v. *Cuniff*, 165 S. W. (2d) 933 (Tex. Civ. App.) (1942). Compliance with the statute cannot be made a matter of private choice. Remedial statutes in the public interest (see *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364), including wage-and-hour statutes, are not to be waived or avoided by private agreement. *United States* v. *Morley Construction Co.*, 98 F. (2d) 781, 789 (C. C. A. 2), certiorari denied *sub nom. Maryland Casualty Co.* v. *United States*, 305 U. S. 651; *Larsen* v. *Rice*, 100 Wash. 642 (1918); *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622, 626 (C. C. A. 7). The contracts involved in the present case are nothing more than attempts to write such a waiver in different verbiage. They continue unchanged a daily wage, antedating the Act, which was therefore unconcerned with the

[36] It may seem trite to call the Court's attention to its many admonitions, notably in the tax field, that in measuring compliance with statutory requirements its concern is not with the form in which the parties clothe their actions but with the substance of what they have done. A different course would "exalt artifice above reality and * * * deprive the statutory provision * * * of all serious purpose." *Gregory* v. *Helvering*, 293 U. S. 465, 470. See also *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, 613; *Higgins* v. *Smith*, 308 U. S. 473, 477.

weekly hours worked, and made no provision for extra compensation for weekly overtime. There was added only the "technically elegant arrangement" (*Griffiths* v. *Commissioner*, 308 U. S. 355, 357) of the contract, by which the wages "'are attributed to a different tree from that on which they grew.' *Lucas* v. *Earl*, 281 U. S. 111, 115" (*id.*, p. 358).

We believe we have already demonstrated that respondent's contracts do not conform to the letter of Section 7. In the words of Mr. Justice Holmes, moreover, respondent's plan must be "condemned as an evasion" because "it is on the wrong side of the line indicated by the policy if not by the mere letter of the law." *Bullen* v. *Wisconsin*, 240 U. S. 625, 630–631.

C. *The decision in the Belo case does not support the validity of respondent's method of payment.*—Respondent relies upon *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, to sustain the validity of its plan, and both lower courts upheld the contracts in question on the authority of that decision. We submit that this is the result of a misunderstanding of the *Belo* case.

The employment contracts in the *Belo* case were different. In that case the agreement fixed a regular hourly rate and provided that the employees were to receive not less than time and a half for every hour of overtime work beyond the maximum hours fixed by the Act (p. 634). Weekly salaries were at the same time guaranteed.

This Court concluded that the hourly rate specified was in fact one of two actual bases for the employee's compensation; for when more than 54½ hours* were worked in a week, the guaranteed sum became inadequate to cover the overtime and the employee was entitled to extra compensation which he was paid. The Government's contention that the specified hourly regular rate was fictitious was therefore rejected.

The weekly guaranty was held by this Court not to negative compliance with Section 7 even though the employees did not always work enough hours to earn it at the specified hourly rate for the first 40 hours and time and one-half for hours over 40, since the contracts provided a higher overtime rate in such instances. The Court pointed out that the contracts, like Section 7, provided that "not less than" one and one-half times the regular rate would be paid; and the excess which the guaranteed weekly salary provided in overtime weeks of less than 54½ hours was viewed as simply an additional premium for overtime. This Court emphasized that the Circuit Court of Appeals had "found that the contracts were 'actual bona fide contracts of employment' and that 'they were intended to, and did, really fix the regular rate at which each employee was employed'" (pp. 629–630). Hence the contracts were found to ful-

* When the statutory workweek was 44 hours; 53 hours when it was reduced to 40 hours in 1940.

fill the Congressional purpose of providing an increased rate of at least time and one-half "for every hour of overtime work beyond the maximum hours fixed by the Act" (p. 634).

In the instant case, by contrast, the "regular" hourly rate specified did not, as has been shown, have any demonstrable effect in determining the employee's weekly compensation. The fixed *daily* wage which was the achieved aim of respondent's contracts was invariable whatever the length of the workweek. There was no burden to the employer and no premium to the employee in workweeks of whatever length. Respondent's employees working 8-hour tours would have had to work 25 hours longer than their customary workweeks and more than double the statutory maximum workweek to become entitled under the contracts to more than their normal compensation. Such hours were never worked and this purely theoretical possibility[38] of receiving additional compensation has no more significance than the fact

[38] The Circuit Court of Appeals in the instant case found the provision in the "X" contract for payment of not less than the minimum straight time wage of $0.30 an hour and $0.45 for overtime hours after 40 insufficient to save that contract from invalidity. "* * * that provision has no practical operative effect whatever because in order to earn more than the stipulated weekly wage the employee would be obliged to work unreasonably long hours—far in excess of the hours which the parties could reasonably have contemplated" (R. 118–119). And yet the lease pumper, Farrar, under his "X" contract (R. 53–55) would have had to work only a few hours longer to be entitled to more than his stipulated weekly wage of $38.93 than would the watch-

in the *Missel* case that the weekly wage would have become inadequate to yield the statutory minimum overtime rate of $0.45 for additional overtime hours at some point in the workweek and that further payments would then have become necessary.[39] 319 U. S. 572, 574–575.

The Belo decision determined a "close" question presented by contracts designed to meet the "special problems" of providing the "security of a regular weekly income" to employees in a business which necessarily involved workhours which "fluctuate from week to week", 316 U. S. at p. 635. The decision cannot be stretched to approve an arrangement which for all its "technical elegance" simply perpetuates the payment of a fixed daily wage for a fixed workday, without any provision for weekly overtime work.

Certainly the Belo decision is not to be regarded as announcing the doctrine applied by the court below (R. 116–117) that the parties may fix by contract any rate they choose as the regular rate upon which the overtime rate is to be com-

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man or swamper working a 12-hour tour under their split-day contracts (R. 31). The latter would theoretically be entitled to additional compensation after 96 hours a week; Farrar after 99. In both cases the obligation to pay the additional sums was illusory. Certainly neither Farrar nor the watchman looked forward to the prospect of additional compensation as a perquisite of his job.

[39] The $27.50 weekly salary involved in the *Missel* case was adequate to cover the $0.30 straight-time minimum rate and a $0.45 overtime rate for approximately 74 hours under a 40-hour statutory maximum workweek.

puted, regardless of its relationship to the employer's wage cost.[40] A court must surely examine beyond the parties' assertion of what the regular

[40] There has been no agreement among the inferior courts in their interpretation and application of the *Belo* case. Some, like the court below, have regarded Section 7 as complied with if there is a "regular rate" stipulated in the contract of employment even though a different rate in fact was paid. *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), affirmed *sub. nom. Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5); *Walling* v. *Emery Wholesale Corp.*, 49 F. Supp. 192 (N. D. Ga.), affirmed 138 F. (2d) 548 (C. C. A. 5); *Walling* v. *Lexington Roller Mills*, 6 Wage Hour Rept. 923 (E. D. Ky. 1943); *Walling* v. *Villaume Box & Lumber Co.*, 6 Wage Hour Rept. 544 (D. Minn. 1943); *Walling* v. *Uhlmann Grain Co.*, 7 Wage Hour Rept. 128 (N. D. Ill. 1944). Other courts have refused to apply the Belo decision to situations in which the stipulated rates are not controlling because they bear no reasonable relation to the wages paid. *Walling* v. *L. J. Mueller Furnace Co.*, 50 F. Supp. 561 (E. D. Wis); *Welling* v. *Highway Express, Inc.*, 6 Wage Hour Rept. 363, 364 (W. D. Tenn. 1943); *Walling* v. *Fischer Lime & Cement Co.*, 7 Wage Hour Rept. 624 (W. D. Tenn. 1944); *Wilks* v. *Phillips & Buttorff Mfg. Co.*, 7 Wage Hour Rept. 832, 835 (Tenn. Ct. of App. 1944).

Other courts have thought that the guaranty of a weekly salary is an essential feature of any contract if it is to meet the test of the Belo decision. In the instant case the court below approved the Poxon plan although it provided no weekly guaranty, notwithstanding the fact that in *Walling* v. *Green Head Bit & Supply Co.*, 138 F. (2d) 453 (C. C. A. 10), the same court seemed to rely upon the absence of such a provision as a ground for distinguishing the Belo contract from the contract before it.

See also *Scott* v. *Atlas Press Co.*, 49 F. Supp. 260 (W. D. Mich.); *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. (2d) 655 (C. C. A. 10); *Walling* v. *Stone*, 131 F. (2d) 461 (C. C. A. 7); *Patsy Oil & Gas Co.* v. *Roberts*, 132 F. (2d) 826 (C. C. A. 10); *Seneca Coal & Coke Co.* v. *Loftin*,

rate is. And while it is true that rates of pay, which determine wage costs, are the result of consensual arrangements between employer and employee, full freedom to contract as to what rate shall be regarded as the "regular rate" for the purpose of calculating overtime under Section 7 cannot be postulated without defeating the legislative purpose. The basic plan of this Section was to restrict freedom of contract with respect to wages for hours above the maximum. *United States* v. *Darby*, 312 U. S. 100, 125. No contract has validity which "falls short" of the "basic policy" of Section 7. *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 602–603.

Section 7 (b) of the Act relaxes the requirements of Section 7 (a) in return for a uniform wage upon an annual basis only when such an arrangement is "made as a result of collective bargaining by representatives of employees certified as *bona fide* by the National Labor Relations Board" and the annual hours are limited to an average of not more than 40 each week and the hours in any one week to 56.[41] The careful limita-

136 F. (2d) 359 (C. C. A. 10), certiorari denied, 320 U. S. 772; *Murray* v. *Noblesville Milling Co.*, 131 F. (2d) 470 (C. C. A. 7), certiorari denied, 318 U. S. 775, for other interpretations of the Belo decision.

[41] Section 7 (b), 52 Stat. 1063, 29 U. S. C. sec. 207 (b) as amended by the Act of October 29, 1941, 55 Stat. 756, 29 U. S. C. sec. 207 (b), Supp. III, provides:

"No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in

tion which Congress imposed upon this contractual method by which the requirements of Section 7 (a) could be superseded [42] is a strong indication of the restricted area in which Congress intended variations by private contract to operate.[43]

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excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—* * * *

"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks,

"* * * if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed."

[42] "Congress was not unaware of the effect that collective bargaining contracts might have on overtime pay. It expressly decided to give effect to two kinds of collective agreements, as specified in Section 7 (b) (1) and (2) of the Act. Cf. Section 8 (c). It thus did not intend that other collective agreements should relieve employers from paying for overtime in excess of an actual workweek of 40 hours, regardless of the provisions of such contracts." *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 602–603, n. 18.

[43] Under Section 7 (b) (2), as amended, an employee pursuant to a collective bargaining agreement may work only 2,080 hours a year and not over 56 hours a week or 12 hours a day. Under respondent's contracts an employee on an 8-hour tour may work 4,160 hours a year (80 × 52 weeks) without additional compensation, and an employee on a 12-hour tour may work 4,992 (96 × 52 weeks).

If parties may by contract stipulate a regular rate unrelated to the facts of the employ nent arrangement, then the only limits to the pe missible schemes for avoiding Section 7 will be hose imposed by the limitations of ingenuity. And the principal victims of evasive schemes will be unorganized employees, the very workers this court has often recognized to be most in need of statutory protection—the workers for whom the Fair Labor Standards Act was primarily designed.

CONCLUSION

The decision below should be reversed and the cause remanded for further proceedings.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
IRVING J. LEVY,
RALPH F. FUCHS,
Department of Justice.

DOUGLAS B. MAGGS,
Solicitor.
HARRY M. LEET,
Attorney,
United States Department of Labor.

SEPTEMBER 1944.

APPENDIX A

[EXHIBIT C, R. 31]

Employment Contract No. 529

1B

Date: Sept. 4, 1940.

Place: Salem, Ill.

HELMERICH & PAYNE, INC.,
415 Philtower, Tulsa, Oklahoma.

GENTLEMEN: I hereby accept employment with you as a Rotary Helper upon the following wage scale and conditions, to wit:

The base or regular rate per hour for employees coming under classifications 1, 2, 3, 4, 5, 6, 7 and 10 below shall be paid for the first 4 hours in each 8-hour tour and hours (in each said 8-hour tour) in excess of the 4 shall be paid for at 1½ times said base or regular rate.

The base or regular rate per hour for employees under classifications 9, 11 and 12 below shall be paid for the first 5 hours in each 12-hour tour and hours (in each said 12-hour tour) in excess of the 5 shall be paid at 1½ times base or regular rate.

The base or regular rate per hour for employees under classification 8 noted below shall be paid for the first 5 hours in each 10-hour tour and hours (in each said 10-hour tour) in excess of the 5 shall be paid for at 1½ times base or regular rate.

In event each monthly compensation of any employee of the following classifications:

Lease Pumpers (classification No. 8)	$130.00
Truck Drivers (classification No. 11)	165.00
Swampers (classification No. 12)	150.00

does not equal the sum hereinabove set opposite the same, the Company will advance said employee the difference which shall apply on future overtime payments; adjustment to be made on January 1st of each year and when said employment ceases.

Base or regular hourly rates are as follows:

Classification	
1. Rotary Driller	$1.10
2. Rotary Helpers	.70
3. Cable Driller	1.00
4. Tool Dresser	.80
5. Mechanics	.70
6. Roustabouts (in Kansas and Texas)	.48
7. Water Pumpers	.45
8. Lease Pumpers	.34
9. Watchmen	.30
10. Roustabouts (in Oklahoma and Illinois)	.50
11. Truck Drivers	.35
12. Swampers	.32

Base rate shall never apply to more than 40 hours in any work week.

I agree to make daily reports to your home office at 415 Philtower, Tulsa, Oklahoma, of all my work time while in your employ.

It is understood that you may terminate my employment at any time either with or without cause and either with or without notice as you may in your uncontrollable discretion, from time to time determine.

W. E. BECHTEL,
Employee.

Witnesseth:

CHAS. STALEY,
Company's Representative. (2-E)

APPENDIX B

1. State statutes and regulations prescribing overtime pay by reference to a multiple of the "regular" or "normal" rate or similar base:

Colo. Laws 1937, c. 113, sec. 4 (a), (c) ("one and one-third times the normal rate"); Order No. 2, for Retail Trade Occupations ("one and one-half times the regular hourly rate"); Nev. Compiled Laws, par. 2825.42 ("time and one-half for each said additional hour, computed on their regular wage rates"); N. Car. Gen. Stat. (1943) par. 95–17 ("one and one-half times the usual compensation for all hours worked over fifty-six); Okla. Stats. (1940), tit. 40, par. 82 ("double their regular compensation for such extra time"); Ore. Comp. L. Ann. (1940), sec. 102–502 ("time and one-half the regular wage"); Orders No. 7 and 12 (1941) Wage Hour Comm. ("time and one-half her regular rate of pay" and "the regular hours"); Regulations pursuant to Pa. Stat. (Purdon 1941), tit. 43, sec. 103, Governing the Mail Order Industry and Retail Trade, Pennsylvania Department of Labor and Industry, 1942, p. 11 ("the rate of one and one-half times the regular rate per hour"); S. Car. Acts 1937, No. 326, sec. 1, as amended Acts 1939, No. 204 (Sunday work, "on the basis of one and one-half the amount of the usual average day wage or salary earned by such employee during other days of the week"); Acts

1938, No. 943, sec. 2 (c) ("the said employer shall pay the employee for all overtime at the rate of one and one-half the regular wages"); Tex. Stat. (Vernon 1936), art. 5169, 5170, ("rate of double her regular pay for such time as she is employed for more than nine hours per day"); Washington, Rev. Stat. (Remington 1932) sec. 7643 ("one and one-half times the rate of pay allowed for the same amount of time during eight hours' service"); Wis. Stat. (1943), sec. 103.02 ("one and one-half times the regular rates"), sec. 103.50 ("1½ times his hourly rate of pay"); Ore. Comp. L. Ann. (1940), sec. 102–323 ("time and a half for time over ten hours per day when employed in canneries or driers or packing plants * * * piece workers shall be paid one and a half the regular prices for all work done during the time they are employed over ten hours per day").

2. State statutes containing expression "time and one-half" as self-explanatory:

Ariz. Code Ann. (1939), sec. 56–101 (a) ("time and one-half for all time in excess of eight hours"); Ark. Stat. (Crawf. & M. Dig. 1921, sec. 7109 ("at the rate of time and one-half for hours worked in excess of nine hours"); N. Mex. Stat. (Supp. 1938), sec. 80–207 as amended, Laws 1939, c. 196, seg. 7; sec. 80–502, 80–504 ("labor in excess of forty-eight hours * * * shall be paid for on the basis of time and one-half for such excess"); Ore. Laws 1937, c. 360 ("double pay for the overtime so employed"); Wyo. Rev. Stat. (1931) sec. 63–113 ("time and a half for each and every hour of overtime in any one day").

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